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No. 02-209

In the Supreme Court of the United States

PETER N. FERNANDEZ, III, PETER N. FERNANDEZ, JR., AND KENNETH K. GETTY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
MARC I. OSBORNE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 666 requires the government to establish a nexus between the defendant's conduct and a federal interest.

2. Whether the district court committed reversible error by failing to instruct the jury sufficiently that materiality is an element of mail fraud.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 282 F.3d 500. The opinion of the district court (Pet. App. 19a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2002. On May 24, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 4, 2002 and the petition was filed on August 2, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioners were convicted of eight counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346; four counts of obtaining money by fraud from a local government that receives funds from a federal program, in violation of 18 U.S.C. 666; five counts of engaging in monetary transactions in property derived from mail fraud, in violation of 18 U.S.C. 1957; and four counts of money laundering, in violation of 18 U.S.C. 1956. Pet. App. 2a. Petitioner Getty was sentenced to 66 months' imprisonment; petitioner Fernandez, Jr. was sentenced to 60 months' imprisonment; and petitioner Fernandez, III was sentenced to 48 months' imprisonment. *Ibid.* The court of appeals affirmed. *Id.* at 1a-18a.

1. In March 1996, the Board of Trustees of the Village of Lyons (Board) selected petitioner Getty to serve as acting mayor. Pet. App. 2a. The mayor is a voting member of the Board and has veto power over its decisions. Gov't C.A. Br. 2. After assuming office, Getty selected, and the Board approved, Norman-Marc Associates Design Build Firm (Norman-Marc) as Village Architect, a position that had not previously existed. Pet. App. 3a. Petitioner Fernandez, Jr., a friend of Getty's, owned Norman-Marc. *Ibid.* Norman-Marc was not a licensed architectural firm, and Fernandez, Jr. was not a licensed architect. *Ibid.* Getty agreed to pay Norman-Marc $100 per hour in consulting fees and a 9% commission on Lyons' construction projects. *Ibid.*

In June 1996, the Board authorized the solicitation of bids for two municipal construction contracts. Pet. App. 3a. Illinois law requires contracts to be awarded to the lowest qualified bidder. *Ibid.* Lyons required potential bidders to submit an application detailing their

experience and financial background. *Ibid.* Getty directed that the announcement soliciting bids run for one day in a newspaper with a circulation of 5000, rather than in a larger paper that the village had used before. *Id.* at 4a. The notice directed prospective bidders to the Building Department Commissioner for qualification questionnaires. *Ibid.* The Building Commissioner never received any inquiries. *Ibid.*

Petitioners arranged to have three companies bid on the project. Jeffery Thompson bid on the projects in the name of Thompson Enterprises, a non-existent company. Pet. App. 4a-5a. Fernandez, Jr. and Fernandez, III provided most of the information in Thompson's bid, including the dollar amounts. *Id.* at 5a. Fernandez, Jr. told Thompson not to talk to any Board member about the bid. *Ibid.* Getty asked his friend Jack Anderson to bid on the projects, but specified that his friend should "bid high." *Ibid.* Getty prepared and submitted the bid. *Ibid.*

Finally, Fernandez, III submitted the low bid on behalf of a company called Midwest Industrial Construction, Inc. Pet App. 5a-6a. The qualification questionnaire listed three client references, but Midwest had not worked for any of them. *Ibid.* Getty falsely told the Board that he had researched the bidding companies, that the bids were legitimate, that he had no conflict of interest, and that the village attorney had reviewed the bidding process. *Id.* at 23a. The village awarded the contracts to Midwest as the lowest bidder for $963,200. *Id.* at 6a.

Fernandez, III then incorporated Midwest, obtained insurance, workers' compensation, and an Employer Identification Number, and opened a bank account. Pet. App. 6a. Midwest subcontracted its contracts to Fernandez, III's employer, Industrial Construction,

Inc., for $784,200. *Ibid.* During the course of the projects, Getty approved additional payments to Midwest of $320,219. *Id.* at 7a. In April 1997, the village stopped Midwest's work on the project. *Ibid.* By then, Midwest had earned a net profit of $93,271. *Ibid.*

2. After petitioners were found guilty on all counts, the district court set a deadline of December 1, 1998, for post-trial motions. Pet. App. 20a. On July 1, 1999, petitioners filed a post-trial motion challenging their jury instructions based on *Neder* v. *United States*, 527 U.S. 1 (1999), which held that materiality is an element of mail fraud. 7/1/99 Pet. Post-Trial Mot. The district court denied the motion as untimely and, in the alternative, held that any error was harmless. Pet. App. 20a-23a.

3. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-18a. The court rejected petitioners' contention that their convictions under Section 666 should be vacated because the government did not establish a "link between a federal interest and the [petitioners'] fraud." *Id.* at 17a. Relying on its prior decision in *United States* v. *Grossi*, 143 F.3d 348, cert. denied, 525 U.S. 879 (1998), the court held that it is not necessary for the government to establish such a link. Pet. App. 17a-18a. The court also rejected petitioners' contention that their mail fraud convictions should have been vacated because the indictment did not charge, and the jury instructions did not require the jury to find, materiality. *Id.* at 12a-14a. Reviewing for plain error, the court of appeals concluded that both the indictment and the district court's jury instructions sufficiently charged materiality. *Id.* at 12a-15a.

ARGUMENT

1. Petitioners contend (Pet. 5-17) that review is warranted to resolve a conflict in the circuits on the

question whether 18 U.S.C. 666 requires the government to establish a nexus between the defendant's conduct and a federal interest. Review of that issue is not warranted in this case.

Section 666 makes it illegal for an agent of a local government to obtain by fraud the property of that government, when the local government "receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. 666(a)(1)(A) and (b). The parties stipulated at trial that Lyons received more than the required $10,000 from federal programs in the years in which petitioners' alleged misconduct occurred. Pet. App. 18a.

In *Salinas* v. *United States*, 522 U.S. 52 (1997), a sheriff and deputy sheriff were prosecuted under 18 U.S.C. 666(a)(1)(B) for accepting a bribe from a federal prisoner for contact visits. The Court held that Section 666(a)(1)(B) does not require the government to show that a bribe had any particular effect on federal funds. The Court did not decide whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, because the bribe in that case satisfied any possible statutory nexus requirement. The Court explained that the bribe "was related to the housing of a prisoner in facilities paid for in significant part by federal funds," and "that relationship is close enough to satisfy whatever connection the statute might require." 522 U.S. at 59. The Court in *Salinas* also ruled that there was "no serious doubt about the constitutionality of § 666(a)(1)(B) as applied to the facts of [that] case." *Id.* at 60. The Court explained that the preferential treatment given to the inmate "was a threat to the integrity and proper operation of the federal program." *Id.* at 61.

In the wake of *Salinas*, the courts of appeals have taken divergent approaches on the reach of Section 666. In *United States* v. *Dakota*, 197 F.3d 821, 826 (1999), the Sixth Circuit held that Section 666 "does not require a nexus between the alleged bribes and the federal funding received." Similarly, the Seventh Circuit has held that Section 666 does not require the government to establish a "link between a federal interest and the defendants' fraud." Pet. App. 17a; see *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.), cert. denied, 525 U.S. 879 (1998). In contrast, the Second Circuit has held that there must be "at least some connection between the bribe and a risk to the integrity of the federal funded program." *United States* v. *Santopietro*, 166 F.3d 88, 93 (1999). And the Third Circuit has held that Section 666 "requires that the government prove a federal interest is implicated by the defendant's offense conduct." *United States* v. *Zwick*, 199 F.3d 672, 687 (1999).[1]

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[1] Two other circuits have recently addressed the issue. In *United States* v. *Lipscomb*, 299 F.3d 303 (2002), a divided panel of the Fifth Circuit upheld a prosecution under Section 666, with only two of the three judges expressing a view on the permissible reach of that provision. Compare *id.* at 332-333 (Wiener, J.) (finding Section 666 constitutional as applied to corruption prosecution of former city counsel member), with *id.* at 373 (Smith, J., dissenting) (finding Section 666 unconstitutional as so applied). In *United States* v. *Edgar*, No. 00-14144, 2002 WL 31028287 (Sept. 12, 2002), the Eleventh Circuit upheld a prosecution under Section 666 for theft of funds from a hospital that received federal funds under the Medicare, Part A, program. The court took note (*id.* at *4) of the limitations on the reach of the statute found by the *Zwick* and *Santopietro* courts, but concluded that, in light of *Fischer* v. *United States*, 529 U.S. 667 (2000), those limitations "are built into § 666(b)'s requirement that recipient entities receive at least $10,000 in federal 'benefits' over the course of a year" under

This case is not an appropriate vehicle for resolving the divergence among the circuits on the reach of Section 666, because petitioners' conduct satisfies the nexus requirement that the Second and Third Circuits have established. In this case, the mayor of Lyons, acting in conjunction with petitioners Fernandez, Jr. and Fernandez, III, engaged in a scheme to defraud the village. Because the chief executive officer of a municipality has wide-ranging authority over all of a municipality's programs, his criminal conduct in relation to a municipal program necessarily poses a threat to the municipality's proper administration of federal funds.

The substantial connection between the fraudulent conduct of a municipality's chief executive officer and the federal government's interest in a municipality's proper administration of federal funds is more than sufficient to satisfy the Second and Third Circuits' nexus requirements. When a municipality's chief executive defrauds a municipality that receives federal funds, there is, as the Second Circuit requires, "some connection between the [fraud] and a risk to the integrity of the federal funded program." *Santopietro*, 166 F.3d at 93. And, as the Third Circuit requires, "a federal interest is implicated by the defendant's offense conduct." *Zwick*, 199 F.3d at 687.

Nothing in the Second and Third Circuits' decisions suggests that those courts would fail to find a sufficient nexus when the defendant is a chief executive of a municipality that receives more than $10,000 in federal funds. In *Santopietro*, the Second Circuit expressly

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"sufficiently comprehensive programs"; that inquiry, the court concluded, is broad enough "to assure that applications of § 666 remain within constitutional bounds."

reserved the question whether a defendant's status as a chief executive officer would be sufficient to satisfy that circuit's nexus requirement. The court explained that, because it had affirmed the Section 666 convictions before it on a different ground, "[w]e need not consider whether Santopietro's role as mayor—the chief executive officer of the city and hence the officer ultimately responsible for all city departments—would render the statute applicable to corrupt payments received by him for any transaction involving the city." 166 F.3d at 94 n.3. *Zwick* did not involve a chief executive, and the Third Circuit did not discuss the potential significance of a defendant's having that status. The court emphasized, however, that "a highly attenuated implication of a federal interest will suffice for purposes of § 666." 199 F.3d at 687. If a "highly attenuated" federal interest is sufficient to satisfy the Third Circuit's nexus requirement, a significant federal interest at issue when the scheme to defraud involves a municipality's chief executive also satisfies the Third Circuit's requirement.

Moreover, in describing the kind of case that would fail to satisfy their nexus requirement, both the Second and Third Circuits gave as an example a case in which the government sought to prosecute the city's meat inspector just because the city's parks department had received more than $10,000 in federal funds. *Santopietro*, 166 F.3d at 93; *Zwick*, 199 F.3d at 687. A prosecution based on a fraud committed by a municipality's chief executive does not remotely resemble that hypothetical prosecution.

In sum, the prosecution in this case satisfies the nexus requirement imposed by the Second and Third Circuits. This case therefore does not present an appropriate occasion for the Court to decide whether Section 666 imposes such a requirement.

Furthermore, the resolution of the nexus question would not have a significant practical affect on petitioners. Because petitioners' sentences were imposed concurrently, vacation of their Section 666 convictions alone would affect only the size of their special assessments. For that reason as well, review of the nexus question is not warranted in this case.

2. Petitioners contend (Pet. 17-22) that the district court committed reversible error by failing to instruct the jury that materiality is an element of mail fraud as required by *Neder* v. *United States*, 527 U.S. 1 (1999). That contention is without merit and does not warrant review.

Under Federal Rule of Criminal Procedure 30, "[n]o party may assign as error any portion of the [jury] charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict." Because petitioners did not raise their materiality claim before the jury retired to consider its verdict, that claim is subject to review only for plain error. *Jones* v. *United States*, 527 U.S. 373, 387-389 (1999).

Petitioners argue (Pet. 18) that plain-error review is inapplicable because they raised their claim in a post-trial filing. But under the terms of Rule 30, a post-trial filing is not sufficiently timely to avoid plain-error review. Moreover, petitioners raised their post-trial materiality claim long after the deadline for post-trial motions established by the district court. Pet. App. 20a. The court of appeals therefore correctly reviewed petitioners' materiality claim under a plain-error standard.

In order to obtain relief under a plain error standard, a defendant must show that the error (1) is plain or obvious, (2) affects substantial rights, and (3) seriously affects the fairness, integrity, or public reputation of

judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioners failed to satisfy those standards.

First, as the court of appeals concluded, petitioners failed to show that any error in the instructions was plain or obvious. In *Neder*, the Court held that 18 U.S.C. 1341 requires proof that the defendants executed a fraudulent scheme involving misrepresentation or concealment of a material fact. 527 U.S. at 20-22. A material fact is one that a reasonable person would consider important in determining his choice of action or one that the defendant knew or had reason to know that the victim would actually consider important. *Id.* at 22 n.5. It is not plain or obvious that the district court's instructions conflict with *Neder*.

The district court gave the following instructions:

> In considering whether the government has proved a scheme to defraud, it is essential that one or more of the false pretenses, representations, promises or acts charged in the portion of the indictment describing the scheme be proved, establishing the existence of a scheme beyond a reasonable doubt. However, the government is not required to prove all of them.
>
> A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or cause the loss of money or property to another or to deprive another of someone's honest services.
>
> The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat a victim in order to cause a gain of

> money or property to the defendant or to deprive another of someone's honest services.

Gov't C.A. Br. 41.

Those instructions did not specifically use the term materiality. But as the court of appeals explained, the instructions sufficiently conveyed to the jury that petitioners could be convicted only if it found that petitioners "made false representations which were capable of influencing, and thereby deceiving, Lyons." Pet. App. 14a. At the very least, it is not plain or obvious that the instructions were fatally deficient.

Nor have petitioners satisfied the other preconditions for obtaining relief under a plain-error standard. The evidence in this case overwhelmingly established that petitioners' fraudulent conduct was material. As the district court explained, Getty "repeatedly lied to the Village Board of Trustees for the purpose of influencing its decision." Pet. App. 23a. In particular, petitioners arranged for three companies to submit fraudulent bids that would make Midwest the low bidder, and Getty falsely told the Board that he had researched the three companies, that the bids were legitimate, that he had no conflict of interest, and that the bids had been reviewed by the village attorney. *Ibid.* No rational jury that found that petitioners engaged in that conduct could have failed to find that their conduct was material to the Board's decision to award the construction contracts to Midwest. Thus, any error in the jury instructions neither affected substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Neder*, 527 U.S. at 16 (omission of materiality instruction does not warrant relief on harmless error review when the evidence was overwhelming and

incontrovertible); *Johnson*, 520 U.S. at 466-467 (same, on plain-error review).

In any event, the court of appeals in this case cautioned district courts to include a specific materiality instruction in future cases. Pet. App. 15a n.6. The question whether the instructions in this case adequately charged the jury on materiality therefore does not raise any issue of recurring importance that warrants this Court's review.[2]

3. Finally, petitioners contend (Pet. 21) that *United States* v. *Handakas*, 286 F.3d 92, 100-112 (2d Cir.), cert. denied, No. 02-5086 (Oct. 7, 2002), "cannot be disregarded." That decision, however, has no relevance here. In *Handakes*, the Second Circuit held unconstitutionally vague a charge that a general contractor deprived a state agency of honest services by falsely certifying in his contract that he was paying prevailing

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[2] While petitioners' question presented (Pet. i) refers to the failure of the indictment to identify materiality as an element of the offense, the body of the petition (Pet. 17-22) does not develop that argument. That question is therefore not properly presented here. In any event, because petitioners raised the indictment issue for the first time on appeal, it is subject to review only for plain error. *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002). That standard is not satisfied here. *Neder* held that the term "defraud" in the mail fraud statute incorporates the common-law requirement of materiality. See 527 U.S. at 21-25. The indictment used the same term, charging that petitioners "devise[d] * * * and participated in a scheme and artifice to defraud." Superseding Indictment 5 para. 2. Accordingly, it is not plain or obvious that the indictment conflicts with *Neder*. Furthermore, as discussed above, the evidence overwhelmingly establishes that petitioners' actions were material. Any deficiency in the indictment therefore neither affected petitioners' substantial rights nor seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Cotton*, *supra* (plain-error review).

wages to his employees. *Ibid.* To the extent that petitioners are challenging their convictions on vagueness grounds, that contention is not properly presented here. Petitioners did not raise that contention in the court of appeals, and that contention is not included in their questions presented. In any event, any vagueness challenge would be insubstantial on the facts of this case. A village is plainly deprived of honest services when its mayor and village architect engage in a fraudulent bid rigging scheme that is designed to cause the village to overpay for municipal construction.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
MARC I. OSBORNE
Attorney

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[3] The vagueness question also does not warrant review based on *Handakas* because on July 8, 2002, the Second Circuit granted rehearing en banc in *United States* v. *Ribicki*, to address whether 18 U.S.C. 1346, defining a scheme to defraud to include a scheme to deprive another of the intangible right to honest services, is unconstitutionally vague on its face. See *United States* v. *Rybicki*, 287 F.3d 257 (2d Cir. 2002) (panel opinion affirming conviction). Until the Second Circuit has clarified its position, there is no need for this Court's intervention.